Filed Jan. 23, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 471.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, APPELLANTS,

vs.

W. H. COLER AND COMPANY.

BRIEF IN SUPPORT OF MOTIONS TO ADVANCE AND EXTEND TIME FOR ARGUMENT.

A. C. AVERY,
Counsel for Appellants.

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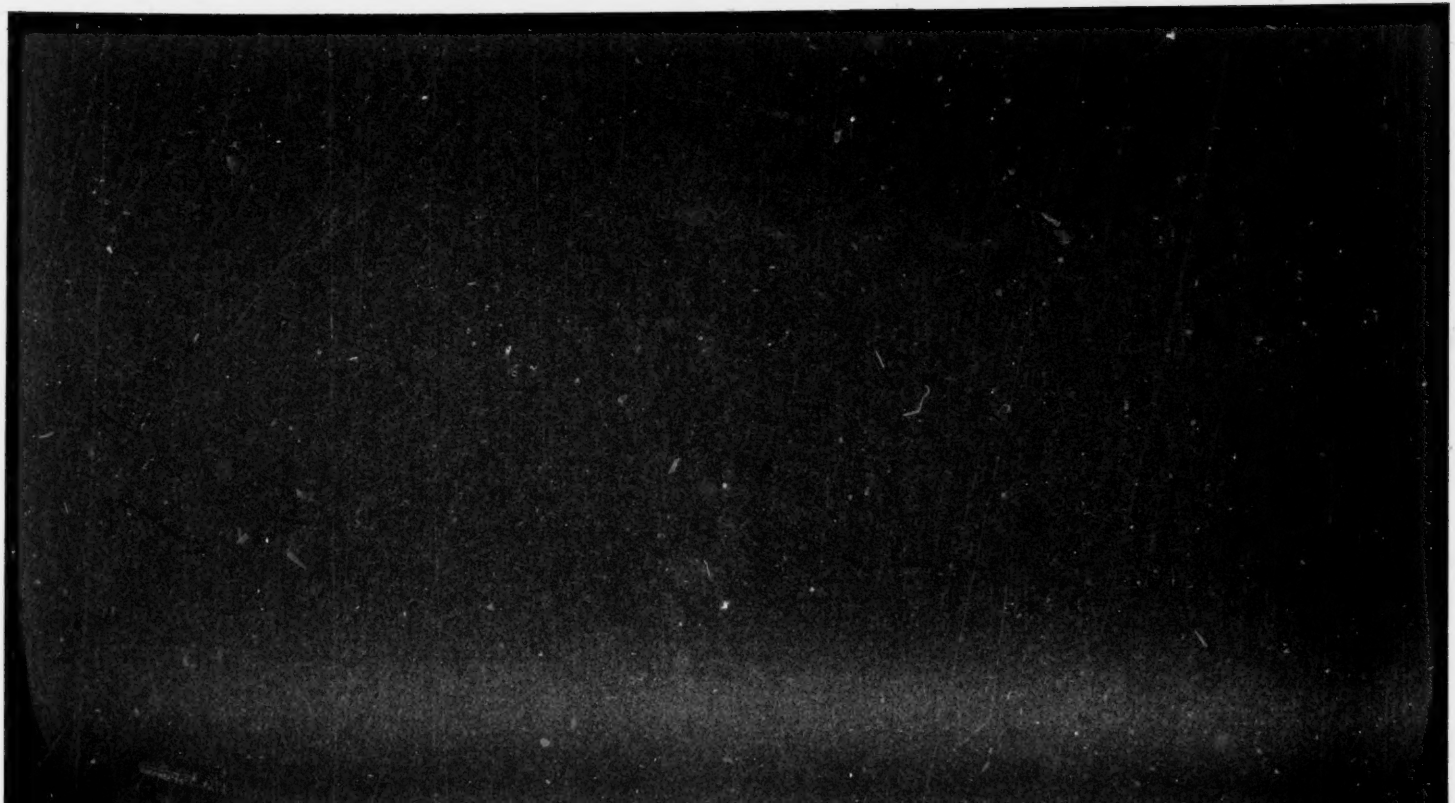

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 471.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, APPELLANTS,

vs.

W. N. COLER AND COMPANY, APPELLEES.

Brief of A. C. Avery, Solicitor for Appellants, in Support of Motions to Advance and Extend Time for Hearing.

FACTS RELIED ON IN SUPPORT OF MOTIONS.

This is one of four suits in equity and actions at law now pending in the Federal courts and involving the question whether four decisions of the supreme court of North Carolina, construing the constitution and laws of that State in their bearing upon the validity of municipal bonds, were erroneous and should be disregarded by the Federal tribunals. In two of these causes, Commissioners of Stanley *vs.* Coler and Commissioners of Oxford *vs.* Bank, opinions were filed in the United States circuit court of appeals, fourth

circuit, by Judge Goff, overruling in the first case an opinion of Judge Simonton in the circuit court, and in the second case overruling an opinion of Judge Purnell. The two last-named judges had refused to follow the opinions of the supreme court of North Carolina. The opinion filed in the United States circuit court of appeals followed the decisions of the State court in the two causes mentioned, and which depended upon questions substantially the same as those certified to the supreme court in the case at bar. The United States circuit court of appeals for the fourth circuit, being differently constituted at the November term, 1899, certified to this court the questions submitted in this cause, and ordered that mandates should not be issued to the circuit court, either in Commissioners of Stanley *vs.* Coler or Commissioners of Oxford *vs.* Bank, until the questions certified in this case should have been answered. Judge Simonton, who presided over the United States circuit court of appeals for the fourth circuit, at the November term, 1899, had filed an opinion in the circuit court and had refused to follow the decision of the supreme court of North Carolina, and had been followed by Judge Thomas R. Purnell for the eastern district of North Carolina in his ruling both in Commissioners of Oxford *vs.* Bank and in the case at bar when it was heard in the circuit court at Greensboro.

Substantially the same questions are involved in an action at law brought in the circuit court for the western district of North Carolina, at Asheville, to enforce the collection of past-due coupons upon bonds of the county of Buncombe which have been declared invalid by the supreme court of North Carolina. The trial of this action has also been postponed to await the response to the questions certified in this cause.

The four decisions of the supreme court of North Carolina, which it is contended the Federal courts are not bound to follow, are the following:

Bank *vs.* Commissioners, 119 N. C., 214.
Commissioners *vs.* Snuggs, 121 N. C., 394.
Commissioners *vs.* Call, 123 N. C., 308.
Commissioners *vs.* Payne, 123 N. C., 432.

Such an unfortunate, if not unseemly, conflict between the State and Federal tribunals should be settled as speedily as possible, and it seems to the appellants that the Supreme Court of the United States should depart from the letter of the rules governing its procedure to put an end to such a conflict without regard to the magnitude of the interest involved, viewed from a financial standpoint.

The appellants are of the opinion that the facts set forth above bring this cause within the exception of rule 26, subsection 7, by showing "special and peculiar circumstances." While the questions certified in this case are left open, any judge who may hold a circuit court in either of the districts of North Carolina would be left at liberty either to follow or disregard the decisions of the highest court of the State, which have already been cited. A very unusual state of affairs is presented when the judges of the circuit court of the United States are so long left at liberty to restrain the local agencies of the State from obeying the law as interpreted by the highest tribunal of the State. For two years circuit and district judges, in disregard of State decisions, have been restraining municipal authorities from expending certain funds in a manner declared lawful by their own highest court. Such a state of uncertainty as to what is the law of the land is to be deplored because it embarrasses governmental agencies in the discharge of their duties. But this case appears more clearly to present "special and peculiar circumstances" when we consider the fact that they affect the validity of a class of securities offered upon the market as negotiable, which are declared by the State courts to be void because issued without such authority as is declared essential by mandatory requirement of the State constitution, while subordinate Federal tribunals are invit-

ing investment in these securities by holding that the decisions of the State court are in violation of the Constitution of the United States.

As the reason for advancing the hearing in this case, the appellants submit that the action of the United States circuit court of appeals in certifying these questions, which had been passed upon by that court at the term immediately preceding, shows that the court was impressed with the very great importance of a speedy adjudication by the court of last resort for the reasons already stated.

A. C. AVERY,
Solicitor for Appellants.

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
Clerk.

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Brf. of Shepherd for Appts. (one)

UNITED STATES OF AMERICA,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Filed Feb. 5, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, *Appellants*,

versus

W. N. COLAR & COMPANY.

Brief in Behalf of Board of Commissioners of Stanly County.

The Board of Commissioners of Stanly County were sued by W. N. Colar & Co. (the appellees in the above entitled [illegible]) in the Circuit Court of the United States for Western North Carolina. The suit involved the validity of bonds issued by the county to the amount of $100,000.00, and it having been carried to the Circuit Court of Appeals a decision was there rendered reversing the judgment of the Circuit Judge and declaring that the act of the Legislature under which said bonds were issued was void, it not having been passed according to the requirements of section 14, Article II of the Constitution of North Carolina. A petition to rehear was pending when the above-entitled suit was called, whereupon certain questions were certified to this Honorable Court, and the petition to rehear in the Stanly County case was continued to await your decision.

This action was taken because the principal point of decision, just referred to, was common to both cases, and it is respectfully submitted that as the two cases are so intimately associated and involve the same question it is not unreasonable that the Board of Commissioners of Stanly County should request the Court to allow it to be heard through its counsel on the argument in the case now before the Court.

The action of the Circuit Court of Appeals has practically blended the two suits so that a decision of the said question in one will control in the other, and it would seem very hard that on this pivotal question, practically determining this large litigation, the Board of Commissioners of Stanly County should not be heard.

We are aware that prior to the act constituting the Circuit Court of Appeals, and providing for the certification of questions to the Supreme Court, the discretion vested in the latter of hearing additional counsel was very sparingly exercised. But we respectfully submit that since the said act, under which practically several cases may, as in the present instance, be determined upon the certification in one, the rule should be so relaxed as to allow the parties concerned a reasonable hearing. The justness of this is strikingly illustrated in the present litigation, as the Stanly County case is *distinctly continued* by the Circuit Court of Appeals in order to await the decision of the question certified, and all we ask is a very short time in which to be heard in a matter so vitally affecting the tax payers of an entire county.

We also concur in the motion that this cause be advanced on the docket, as the point under consideration is involved in the bond issues of other counties and town municipalities, and an early decision, in our opinion, is of very great public concern in North Carolina.

JAS. E. SHEPHERD,

Of Counsel for the Board of Commissioners of Stanly County.

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No. 164.

Brief of Burton for Oxford

Filed Sept. 27, 1900.

Office Supreme
FILE
SEP 27
JAMES H. McKEN

No. 164

UNITED STATES SUPREME COURT.

COMMISSIONERS OF WILKES COUNTY

against

W. N. COLER & CO.

Brief of R. O. BURTON, for Commissioners of Oxford.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY, APPELLANT,

against

W. N. COLER & COMPANY.

Brief of R. O Burton, filed in behalf of the Commissioners of Oxford, by leave of the Court.

STATEMENT OF FACTS.

After the decision of the case of *The Commissioners of Oxford, N. C., v. The Union Bank of Richmond*, by the Circuit Court of Appeals of the 4th Circuit (96 Fed., 293), application was made by the bank for leave to file a petition to rehear. Pending the consideration of this, the Court certified up to this Court the three questions now presented; and retained the Bank's application till these questions should be answered. Thereupon the Commissioners of Oxford asked for leave here to be heard on the argument; and leave was granted to file a brief.

This case (*Oxford v. Bank*) is an action brought in the Circuit Court of the United States for the Eastern District of North Carolina, to recover judgment upon certain coupons for interest on alleged bonds, and to compel the defendant by mandamus to levy taxes and pay the same.

The pertinent facts of the case are as follows:

The General Assembly of 1891 passed an act to incorporate the Oxford and Coast Line Railroad Company, whose termini should be Oxford and Spring Hope, or some other point to be selected by the company. Laws 1891, chapter 315. The eighth and tenth sections of said act are as follows:

"Section 8. Any railroad company, whether incorporated under this or the laws of any other State, is hereby authorized to subscribe to the capital stock of said railroad company, or to lend money to or endorse the bonds or other evidences of debt of the same, and may pay for their subscription to the capital stock of said Oxford and Coast Line Railroad Company in cash, or by the issue of their bonds, or otherwise, and said Oxford and Coast Line Railroad Company may mortgage its road-bed, rolling-stock and franchises, and may issue bonds as the directors thereof may determine, and may provide for the conversion of such bonds into the capital stock of said company."

"Section 10. That whenever any county, city, town or township shall issue bonds to aid in building said Oxford and Coast Line Railroad, the money derived from the taxation of said railroad within said county shall be applied to the payment of the interest on said bonds so long as they shall remain outstanding; and in the event that two or more cities, towns or townships in any county shall issue bonds as aforesaid, then the money derived from the taxation of said railroad within said county shall be applied to the interest on said bonds in proportion to the amount of bonds so issued by said cities, towns or townships as aforesaid."

A petition was presented in 1891 to the Board of Commissioners of Oxford, asking that an election be held on the question of subscribing $40,000 to the capital stock of said railroad. The election was ordered, and resulted in favor of so subscribing. Afterwards the commissioners refused to issue

the bonds. Thereupon the said railroad company instituted suit to compel the commissioners to issue the bonds. Then an agreement was entered into by the said commissioners and the railroad company by which the commissioners agreed to donate to the railroad company $20,000 in bonds, and the railroad company agreed to release the town from its subscription. A consent judgment was entered up in conformity with this agreement. The railroad company complied with this judgment so far as it was able to do so. But it is manifest that it was able to do but little, as the road was only graded for four and a half miles, and no iron was ever laid upon it; whereas, by the agreement on which the bonds issued it agreed that the road should be fully completed and put in operation within a reasonable time from and after issuing the bonds. The bonds were issued August 1, 1892; and no road has ever been completed. The whole scheme stands abandoned.

The defendant in error purchased sixteen of said bonds in good faith, in the usual course of business, without notice, except such notice as is given by the face of the bonds, and such as the law implies.

The charter of the Oxford and Coast Line Railroad Company was not passed with the formalities required by the Constitution of North Carolina, Article 2, section 14, in this, that in the House of Representatives the bill passed its second and third readings on the same day, and on said readings the yeas and nays were not entered on the Journal. Said section of the Constitution is as follows: "No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several read-

ings, which readings shall have been on three different days, and agreed to by each House respectively; and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal." (Art. 2, sec. 14.)

The defendant in error first sued in the Superior Court of Granville County, and the case went twice to the Supreme Court of North Carolina. (See *Union Bank v. Commissioners of Oxford*, 116 N. C., 339, and 119 N. C., 214.) In the first case no point was made about the proper passage of the railroad charter, which, the bank contends, contains the grant of power to issue bonds; and the court then held that the town had authority to issue the bonds under section 10 of the charter, Laws of 1891, chapter 315. A new trial having been granted, the case was tried again in the Superior Court, when it was made to appear that on the passage of said act in the House of Representatives, it passed its second and third readings on the same day, and the yeas and nays were not entered on the Journal on either of said readings. The court below held this defect did not vitiate the bonds, and instructed the jury to answer the issues in favor of the plaintiff. On appeal the Supreme Court held that Article 2, section 14, of the State Constitution, was mandatory, and reversed the judgment. In the lower court, on the coming down of the certificate and opinion of the Supreme Court, the plaintiff voluntarily submitted to a nonsuit, and then brought an action in the United States Court, both on the same coupons sued on in the State Court, and on other coupons falling due after the beginning of the first action.

The District Judge sitting in the Circuit Court held the bonds valid. This ruling was reversed in the Circuit Court of Appeals.

I shall confine my argument to the proper construction of the articles of the Constitution; to the soundness of the North Carolina construction of them; the propriety of following

the North Carolina cases, and to an attempt to show that no North Carolina decision inconsistent with the doctrine of these cases, has ever been delivered.

I.

The charter of the railroad company was not passed with the formalities necessary to allow a subscription by the town of Oxford, because on its second and third readings in the House the yeas and nays were not entered on the Journal, and the second and third readings were not on different days.

When the original case was first before the State court (116 N. C., 339), the power to subscribe was deduced from a section of the charter of the railroad (Laws of 1891, ch. 315, sec. 10) which is in the following words:

"That whenever any county, city, town or township shall issue bonds to aid in building said Oxford and Coast Line Railroad, the money derived from taxation of said railroad within said county shall be applied to the payment of the interest on said bonds so long as they shall remain outstanding, and in the event that two or more cities, towns or townships in any county shall issue bonds as aforesaid, then the money derived from the taxation of said railroad within said county shall be applied to the interest on said bonds in proportion to the amount of bonds so issued by said cities, towns or townships, as aforesaid."

Article 2, section 14, of the Constitution, is as follows:

"No law shall be passed to raise money on the credit of the State or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any tax upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have

been on three different days, and agreed to by each House respectively,' and unless the yeas and nays on the second and third readings of the bill shall have been entered on the Journal."

Article 2, section 16: "Each House shall keep a Journal of its proceedings, which shall be printed and made public immediately after the adjournment of the General Assembly."

Article 2, section 23, provides:

"All bills and resolutions of a legislative nature shall be read three times in each House, before they pass into laws; and shall be signed by the presiding officers of both Houses."

It is conceded that on the second and third readings of this bill in the House of Representatives, the yeas and nays were not entered on the Journal.

This point has been so elaborately discussed in *Union Bank v. Commissioners of Oxford*, 119 N. C., 214; *Commissioners v. Snugg*, 121 N. C., 394; 123 N. C., 308; 122 N. C., 39; 123 N. C., 432; *Coler v. Board of Commissioners of Stanly Co.*, 87 Fed. Rep., 257; 96 Fed., 293; *Ib.*, 284, that little remains to be said upon it.

There is no conflict with *Carr v. Coke* (116 N. C., 223), as is contended by the bank. We say the point here is entirely independent of that case, and in no wise conflicts with it. *Carr v. Coke* decides that the certificate of the presiding officers is conclusive that the bill has passed. We admit its passage; it is a law of the State. But the certificate does not profess to state whether the yeas and nays were entered upon the Journal—that is something separate and apart from the certificate; and, in the nature of things, the original and best evidence of whether they were so entered is the Journal itself. The entry of the yeas and nays is not an essential of the passage of every bill—it is therefore not covered by the ratification. That does not profess to state anything about the entry. The entry is required by a totally different clause of the Con-

stitution, and neither is involved in the other. This distinction is alluded to in the concurring opinion of Montgomery, J., in *Carr v. Coke:*

"It is to be always kept in mind that the point is not as to the powers of the Supreme Court to pronounce a law, which is admitted to have been enacted, void, by reason of its unconstitutionality. Our jurisdiction in that case would be complete and unchallenged. But the question is, where *the Legislature has solemnly certified to a fact*—that is, to the passage and ratification of an act which is within its own sphere—will the judiciary be permitted to inquire into or dispute that certification?"

We dispute nothing that has been certified to; but where the certificate is silent, we seek the truth from the Journal. Texas is one of the States that hold with *Carr v. Coke,* as will appear from the somewhat inaccurate note filed with the Attorney-General's brief in *Field v. Clark,* 143 U. S., 649. But where a bill must pass by a two-thirds majority, the certificate must show the vote; and in *Ewing v. Duncan,* 81 Tex., 233, it was certified that the bill passed by a two-thirds vote—24 to 24—and the court held that a manifest mistake, and looked to the Journal for the truth.

So in *Gardner v. The Collector,* 6 Wall., 499, the approval of the President failing to show the year, resort was had to the Journal. "We are of opinion that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question—always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

A fortiori, when the question is whether the ayes and nays

are entered on the Journals. For inspection is the plain and natural way to find out.

Notwithstanding that the court of Texas is unswerving in refusing to go behind the certificate, it enforces strictly the provision of the Constitution, that the fact of signing by the presiding officers in the presence of the House *shall be entered on the Journal;* and it looks to the Journal to see if this plain Constitutional requirement has been complied with. *Hunt v. The State*, 22 Tex. App., 396. The note to *Field v. Clark* says, that this has been overruled in *Ex parte Tipton*, 28 Tex. App., 438. This is not true; the point was not involved in the latter case, which refers to and distinguishes the former without one word of dissent.

The note in *Field v. Clark* overlooked the later cases in Louisiana. Resort may there be had to the Journal and other sources of information, which in their nature are capable of conveying to the judicial mind clear and satisfactory information. It is held that when the Constitution does not require the legislative Journals to show affirmatively that a particular thing, necessary to the validity of legislative action, was done, mere silence does not invalidate; and though an enrolled bill is not conclusive proof of the valid enactment of a statute, yet the court may look beyond it to the legislative Journals, and they may supply, by presumption, everything necessary to its validity, except when the legislative Journal affirmatively shows a violation of the Constitution. *Hollingsworth v. Thompson*, 45 La. Ann., 222.

Says Mr. Cooley, Const. Lim. (6th Ed.), 163, 164: "Each House keeps a Journal of its proceedings, which is a public record, and of which the courts are at liberty to take judicial notice. If it should appear from these Journals that any act did not receive the requisite majority, or that in respect to it the Legislature did not follow any requirement of the Constitution, or that in any other respect the act was not constitu-

tionally adopted, the courts may act upon this evidence, and adjudge the statute void. But whenever it is acting in the apparent performance of legal functions, every reasonable presumption is to be made in favor of the action of a legislative body; it will not be presumed in any case, from the mere silence of the Journals, that either House has exceeded its authority, or disregarded a constitutional requirement in the passage of legislative acts, *unless where the Constitution has expressly required the Journals to show the action taken, as, for instance, where it requires the yeas and nays to be entered.*"

"It is required by the Constitutions of several of the States, that no bill shall have the force of law until on three several days it be read in each House, and free discussion allowed thereon; unless, in case of urgency, four-fifths, or some other specified majority of the House, shall deem it expedient to dispense with this rule. The Journals which each House keeps of its proceedings ought to show whether this rule is complied with or not; but in case they do not, the passage in the manner provided by the Constitution must be presumed in accordance with the general rule, which presumes the proper discharge of official duty." *Ib.*, 168.

"It is also provided in the Constitutions of some of the States that, on the final passage of every bill, the yeas and nays shall be entered on the Journal. Such a provision is designed to serve an important purpose in compelling each member present to assume as well as to feel his due share of responsibility in legislation, and also in furnishing definite and conclusive evidence whether a bill has been passed by the requisite majority or not. The Constitution prescribes this as the test by which to determine whether the requisite number of members vote in the affirmative. The office of the Journal is to record the proceedings of the House, and authenticate and preserve the same. It must appear on the

face of the Journal that the bill passed by a constitutional majority. These directions are all clearly imperative. They are expressly enjoined by the fundamental law as matters of substance, and can not be dispensed with by the Legislature." *Ib.*, 169.

"When the legislative power of a State is to be exercised by a department composed of two branches, or, as in most of the American States, of three branches, and these branches have their several duties marked out and prescribed by the law to which they owe their origin, and which provides for the exercise of their powers in certain modes and under certain forms, there are other questions to arise than those of the mere intent of the law-makers, and sometimes forms become of the last importance. For in such case not only is it important that the will of the law-makers be clearly expressed, but it is also essential that it be expressed in due form of law, since nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect in the mode pointed out by the instrument which invests them with the power, and under all the forms which that instrument has rendered essential." *Ib.*, 156.

"It will sometimes be found that an act of the Legislature is opposed in some of its provisions to the Constitution, while others, standing by themselves, would be unobjectionable. *So the forms observed in passing it may be sufficient for some of the purposes sought to be accomplished by it, but insufficient for others.* In any such case the portion which conflicts with the Constitution, *or in regard to which the necessary conditions have not been observed, must be treated as a nullity.*" *Ib.*, 211.

This is precisely our contention. The act is good as a railroad charter, but not as an act to authorize a subscription to a railroad. There has been in no State of the Union except

Kentucky an adjudication that militates against my contention—in other words, no other court has held that the requirement that the yeas and nays shall be entered in the Journal is not mandatory; nor has any other court held that the certificate of the presiding officers is a bar to an inquiry into the truth of the matter.

People v. Chenango Co., 8 N. Y., 317, as to entry of the yeas and nays, may be cited as authority against my view but the expression is wholly *obiter*, and has never been followed so far as I can discover.

The following require the yeas and nays to be entered on the Journal, on the final passage of a bill, in all cases:

Ala. Const., Art. 4, s. 21; Ark., Art. 5, s. 22; Cal., Art. 4, s. 15; Colo., Art. 5, s. 22; Fla., Art. 3, s. 17; Idaho, Art. 3, s. 15; Ill., Art. 4, s. 12; Kan., Art. 2, s. 10; Ken., s. 46; La., Art. 37; Md., Art. 3, s. 28; Mich., Art. 4, s. 19; Mo., Art. 4, s. 31; Mon., Art. 5, s. 24; Neb., Art. 3, s. 10; Nev., Art. 4, s. 18; N. J., Art. 4, s. 6; N. D., Art. 2, s. 65; Ohio, Art. 2, s. 9; S. D., Art. 3, s. 18; Wash., Art. 2, s. 22; Wyo., Art. 3, s. 25; N. Y., Art. 3, s. 15.

The following do not:

Conn., Art. 3, s. 9; Del., Art. 2, s. 8; Ind., Art. 4, s. 12 and 18; Iowa, Art. 3, s. 10; Me., Art. 4, s. 59; Mass., Part 2, ch. 1, Art. 2; Minn., Art. 4, s. 20; Miss., Art. 4, s. 5, but it does require entry of certain other proceedings; N. H., Part 2, Art. 7; Oregon, Art. 4, s. 19; Penn., Art. 2, s. 12; R. I., Art. 4, s. 8; S. C., Art. 2, s. 21, 26; Tenn., Art. 2, s. 21—see s. 18, as to fact of signing being on Journal; Tex., Art. 3, see Art. 3, 38; Vt., Chap. 2, s. 14; Ga. (Bills appropriating money alone require entry of yeas and nays), Art. 3, s. 7, p. 12; Va., Art. 5, s. 10; W. Va., Art. 6, s. 29 and 31; Wis., Art. 4, s. 20.

Every one of the former class hold to the rule that the Journal controls the certificate, except New Jersey, Nevada and Kentucky.

The first decisions in California were under its old Constitution, and the Judge who delivered the opinion in the leading case of *Sherman v. Story*, 30 Cal., 253, held that since the change, the court will look to the Journals to see if the bill passed by a majority vote. *San Mateo Co. v. So. Pacific R. R. Co.*, 8 Sawy., 238; 51 Am. Dec., 618; *Weill v. Kingfield*, 54 Cal., 111.

In Louisiana the Journals are now examined. *Morris v. Mason*, 42 La. An., 669; *Hollingsworth v. Thompson*, 45 La. An., 222.

In New Jersey, the decision in *Pangborn v. Young*, 32 N. J. L., 29, does not conflict with my view. The effort in that case was to show that the law certified was different from that passed.

The point has never been presented in Nevada. But where the question was as to the passage of a Constitutional amendment, as to which the Constitution required the amendment and the yeas and nays to be entered on the Journal, the court held with the Iowa court, that the requirement was mandatory. 19 Nev., 391; *Koehler v. Hill*, 60 Iowa, 544. And this is in two States where the enrolled bill is ordinarily the ultimate proof of the law.

In Missouri, after the amendment of its Constitution so that the yeas and nays are required to be entered, the decisions changed, and the provision was held mandatory. *State v. Mead*, 71 Mo., 266, 270.

It is necessary to say but little about the decisions of such States as hold the contrary view to *Carr v. Coke*. For if they allow the Journal to control the certificate, *a fortiori*, should they hold that the Journal must be examined when it is alleged to show, *affimatively*, an express violation of the Constitution.

New York is classed as wavering in the note to *Field v. Clark*. But so far as pertinent to this discussion, there has

been no division of sentiment. The following cases show the present state of the law as to the constitutional requirement that certain bills shall pass by a two-thirds vote: *Rumsey v. Railroad*, 130 N. Y., 88; *People v. Petrea*, 92 N. Y., 128; *People v. Commissioners of Highways*, 54 N. Y., 276; *People v. Allen*, 42 N. Y., 378; *People v. Purdy*, 2 Hill, 31; *Purdy v. People*, 4 Hill, 384, 390; *DeBow v. People*, 1 Denio, 9; *Commercial Bank v. Sparrow*, 2 Denio, 97.

A statute of New York provides that the assent of two-thirds of the members elected to each branch of the Legislature is requisite to every bill appropriating the public moneys or property for local or private purposes; and no bill shall be deemed to have passed by the assent of two-thirds of the members elected to each House unless so certified by the presiding officer of each House. The certificate failed to show that an act so passed—it merely stated that it was passed, and that two-thirds of the members elected were present. The court held it proper in that case to look to the Journal to see whether it properly passed for the purpose contemplated. *Rumsey v. Railroad, supra.*

In *People v. Allen, supra*, the court construed section 9, Article 1, of the New York Constitution, which provides that "the assent of two-thirds of the members elected to each branch of the Legislature shall be requisite to every bill appropriating the public moneys or property for local or private purpose." The act was certified by the President of the Senate and the Speaker of the Assembly, and signed by the Governor, but did not receive the assent of the members elected to each branch of the Legislature. The act was held void. [See an apposite discussion on another provision in *People v. Petrea, supra.*]

In *McDonald v. Dixon*, 80 Wis., 407, the court said that it would examine the Journal far enough to see whether an act published as law was actually passed in accordance with Con-

stitutional requirements. The clause of the Constitution was very similar to the one now before the court.

Constitutions usually provide that the vote on final passage of a bill shall be by yea and nay, which shall be entered on the Journal. The failure to comply with such a provision, as a rule, renders the law void.

23 Am. and Eng. Enc. L., 171.

In Indiana, when a bill has been passed over the Governor's veto, no certificate of such passage is required, and the Journals are resorted to for the evidence therefor.

State v. Denny, 118 Ind., 456.

So, in cases of doubt, the court may look to the Journals to ascertain the legislative intent.

Edgar v. Board of Commissioners, 70 Ind., 331.

The Illinois decisions, on account of the requirement for the entry of the yeas and nays on the Journals, furnish apt illustrations of the doctrine. I refer to—

Spangler v. Jacoby, 14 Ill., 297 (58 Amer. Dec., 571).
Supervisors of Schuyler Co. v. People, 25 Ill., 183.
Ryan v. Lynch, 68 Ill., 160.
Burritt v. Commissioners of State Contracts, 120 Ill., 322.
People v. Starne, 35 Ill., 142.
(See 85 Amer. Dec., 348, for note; also, 51 Amer. Dec., 616—a very full note on the whole doctrine.)

The doctrine of that State is well set out in—

South Ottawa v. Perkins, 94 U. S. 260, and
Post v. Supervisors, 105 U. S., 667.

Field v. Clark, 143 U. S., 649, in nowise conflicts with our view. The court (p. 671) carefully pretermits a discussion

of the question. "In regard to certain matters, the Constitution expressly requires that they be entered on the Journal. To what extent the validity of legislative action may be affected by the failure to have those matters entered on the Journal, we need not inquire. *No such question is presented.* But it is clear that, in respect to the particular mode in which, or with what fulness, shall be kept the proceedings of either House relating to matters *not expressly required to be entered on the Journals* * * * * these and like matters were left to the discretion of the respective Houses of Congress."

The point of that case is on page 672: "The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two Houses of such a bill as one that has passed Congress. It is a declaration by the two Houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the Government, and that it is delivered to him in obedience to the Constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested receives his approval, and is deposited in the public archives, its authentification as a bill *that has passed Congress* should be deemed complete, and unimpeachable." This is clearly stated as the point involved in said case, in *Lyon v. Woods*, 153 U. S., 662. That the point was left an open one in that case further appears from *United States v. Ballin*, 144 U. S., 1, 4: "The Constitution (Article 1, section 5), provides that 'each House shall keep a Journal of its proceedings;' and that the 'yeas and nays of the members of either House on any question, shall *at the desire of one-fifth of those present*, be entered on the Journal.' Assuming that by reason of this latter clause reference may be had to the Journal, to see whether the yeas and nays were ordered, and if so, what was the vote disclosed thereby; and assuming,

though without deciding, that the facts which the Constitution requires to be placed on the Journal may be appealed to on the question whether a law has been legally enacted, yet, if reference may be had to the Journal, it must be assumed to speak the truth."

It is enough for our contention to hold that where the Constitution requires a fact affirmatively to appear by the Journals, a failure so to show it, renders the part of the bill affected by such failure void. The provision is of great importance. To avoid waste of public money and the imposition of unusual taxes upon the people, the fundamental law requires their servants to make a record of their votes. The object is twofold; to show that the bill was not passed carelessly or improvidently, but with the due attendance and sanction of the members; and that the people may hold their servants amenable for extravagant or corrupt legislation.

Besides, constitutional provisions should be held mandatory. "Constitutions do not usually undertake to provide mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done, and they must then be regarded in the light of limitations upon the power to be exercised." Cooley, Cons. Lim., 93. "It will be found upon full consideration to be difficult to treat any Constitutional provision as merely directory and not imperative." *Id.*, 98. See *State v. Patterson*, 98 N. C., 660.

Said Mr. Justice Bradley, in delivering the opinion of the court in *South Ottawa v. Perkins*, 94 U. S., 260: "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties. It would be an intolerable state of things if a document purporting to be an act of the Legislature could thus be a law in one case, and for one party, and not a law in another case, and for

another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another, in the same State. And whether it be a law or not a law, is a judicial question, to be settled by the courts and judges. The doctrine of estoppel is totally inadmissible in the case."

Again: "In our judgment it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The court is bound to know the law, without taking the advice of a jury on the subject. When once it became the settled construction of the Constitution of Illinois that no act can be deemed a valid law unless by the Journals of the Legislature it appears to have been regularly passed by both Houses, it became the duty of the courts to take judicial notice of the Journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but on general principles the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States." *Ib.*

Again: "Not only the courts, but individuals, are bound to know the law, and can not be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score, and can take no advantage from the allegation that he is a *bona fide* purchaser without notice." *Ib.*

See, also, *Gardner v. Collector*, 6 Wall., 511; and *Town of Walnut v. Wade*, 103 U. S., 683. In the last case the court ignored the findings of the court below as to the existence of the statute, and examined the Journals for itself, to ascertain whether the act was duly passed.

Supervisors v. Post was one of the cases heard with *South Ottawa v. Perkins*. It was again before the court in *Post v. Supervisors*, 105 U. S., 667. Mr. Justice Gray, speaking for a unanimous court, says:

"Second. Whether a seeming act of the Legislature is or is not a law, is a judicial question to be determined by the court, and not a question of fact to be tried by a jury.

"Third. The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision.

"Fourth. An act of the Legislature of a State which has been held by its highest court not to be a statute of the State, because never passed as its Constitution requires, can not be held by the courts of the United States, upon the same evidence, to be a law of the State.

"Fifth. That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who take them for value, and in the belief that they have been lawfully issued. * * * Nor is it of any importance that the act of 1857 had been assumed to be an existing law in *Dunnovan v. Green*, 57 Ill., 63; and in *Force v. Batavia*, 61 Ill., 199; for in each of these cases the validity of the statute was not controverted, and by the established practice of that court no evidence of the contents of the Journals could be considered on appeal, which had not been produced and made part of the case in the court below."

In *Lyons v. Woods*, 153 U. S., 649, 663, the court, speaking through the Chief Justice, says: "The question whether a seeming act of the Legislature has become a law in accordance with the fundamental law, is a judicial one, to be tested by the courts and judges, and not a question of fact, to be tried by a jury."

Said Mr. Justice Gray, in delivering the opinion of the court in *Jones v. United States*, 137 U. S., 202: "In the ascertainment of any facts, of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience, from such sources as they may deem most trustworthy. * * * Upon the question of the existence of a public statute, or of the date when it took effect, they may consult the original roll, or other official records."

In re Duncan, 139 U. S., 449, 457, Mr. Chief Justice Ful-

ler, speaking for the court, says: "The distinction is recognized between matters of which the court will take judicial cognizance 'immediately, *suo motu*,' and those which it will not notice 'until its attention has been formally called to them.' (Gresl. Eq. Ev., 292, 306.) As to the last, Mr. Gresley says: 'It will not point out their applicability, nor care for them, but if they are once put in by either party, it will investigate them, and will bring its own judicial knowledge to supply or assist their proof, and will then adopt them as its own evidence, independently of the parties.'"

We need not stop to argue that a municipal promise to pay can only be founded on a right to tax. The validity of a contract which can only be fulfilled by taxation depends on the power to levy a tax for that purpose. *Loan Association v. Topeka*, 20 Wall., 655; *Aspinwall v. Commissioners*, 22 How., 364; *Ottawa v. Carey*, 108 U. S., 122; *Rolles Co. Ct. v. United States*, 105 U. S., 733.

Since the careful discussion of the provision of the Constitution in question, in *Union Bank of Richmond v. Oxford*, 119 N. C., 214, and *Commissioners v. Snuggs*, 121 N. C., 394, I might rest the case upon the construction of the State court; the more so when it is reinforced by the decision of Judge Simonton in *Coler v. Board*, 89 Fed. Rep., 257, and the decision of the Circuit Court of Appeals in this case (*Union Bank v. Commissioners*, 96 Fed., 293), and in *Board of Commissioners V. Coler*, 96 Fed., 284). But I will discuss other phases of the case.

II.

The decision of the State Court is controlling as to the proper passage of the law as a taxing act.

The defendant in error says it is not bound by the State decision because his rights accrued before that decision, and therefore this court will exercise its independent judgment as to the meaning of the North Carolina Constitution. *Folsom v. Ninety-six*, 159 U. S., 611.

It does not matter in this case whether the rule of that case is followed, or the rule laid down in *Stutsman County v. Wallace*, 142 U. S., 293, 306; *Norton v. Shelby Co.*, 118 U. S., 425, 439; *Gormley v. Clark*, 134 U. S., 338, 348; *Bauserman v. Blunt*, 147 U. S., 647, 657. The result, I respectfully submit, will be the same.

It seems to me that whatever may be said about the rule laid down in *Folsom v. Ninety-six*, there is a peculiar propriety in leaving to the State court the settlement of all questions relating to the proper passage of its own laws. Else we shall have the existence or non-existence of a law dependent upon the forum in which it is invoked. It may be a law for a plaintiff in Massachusetts, who sues a citizen of North Carolina, but not for a citizen of North Carolina who sues in his State court a citizen of Massachusetts. Indeed, if the citizen of Massachusetts desires to sue another citizen of that State, and the State court has jurisdiction, then his law ceases to be law, and the accident of jurisdiction destroys the existence of his law.

The Supreme Court has spoken very clearly on this subject. A very apposite case is *South Ottawa v. Perkins*, 94 U. S., 260, where the question arose whether an act of the Legislature of Illinois authorizing a town to issue bonds was properly passed. In that case it had been long established, however, that it was necessary to the validity of a statute that it should appear by the Journals that it was duly passed in the manner required by the Constitution.

Said Mr. Justice Bradley, in delivering the opinion of the court: "It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that State is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise.

"It is declared by the Judiciary Act as a fundamental prin-

ciple,'that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.' (1 Stat. at Large, 73, sec. 34.) And this court has always held that the laws of the States are to receive their authoritative construction from the State courts, except where the Federal Constitution and laws are concerned: and the State Constitutions, in like manner, are to be construed as the State courts construe them."

"If, therefore, the law in question had never been passed upon by the State courts, the courts of the United States would, nevertheless, be bound to give to the Constitution of Illinois the same construction which the State courts give to it, and to hold a pretended act of the Legislature void and not a law which the State courts would hold to be so. Otherwise, we should have the strange spectacle of two different tribunals,having coördinate jurisdiction in the same State,differing as to the validity and existence of a statute of that State, without any power to arbitrate between them. In speaking, however, of their jurisdiction as being coordinate, it is only meant that one has no power to enforce its decisions upon the other. As a matter of propriety and right, the decision of the State courts on the question as to what are the laws of the State is binding upon those of the United States.

"But the law under consideration has been passed upon by the Supreme Court of Illinois. This ought to have been sufficient to have governed the action of the court below."

This case was affirmed in *Post v. Supervisors*, 105 U. S., 667.

Said Mr. Justice Field, in delivering the opinion of the court in *Norton v. Shelby County*, 118 U. S., 425, 440:

"On many subjects the decisions of the courts of a State are merely advisory, to be followed or disregarded, according

as they contain true or erroneous expositions of the law, as those of a foreign tribunal are treated. But on many subjects they must necessarily be conclusive; such as relate to the existence of her subordinate tribunals; the eligibility and election or appointment of their officers; *and the passage of her laws.* No Federal Court should refuse to accept such decisions as expressing on those subjects the law of the State. If, for instance, the Supreme Court of a State should hold that an act appearing on her statute book was never passed, and never became a law, the Federal courts could not disregard the decision and declare that it was a law, and enforce it as such." He cites *South Ottawa v. Perkins*, and *Post v. Supervisors.*

Said Mr. Chief Justice Fuller, speaking for the court in *In re Duncan*, 139 U. S., 449, 456: "It is unnecessary to enter upon an examination of the rulings in the different States upon the question whether a statute duly authenticated, approved and enrolled can be impeached by resort to the Journal of the Legislature or other evidence, for the purpose of establishing that it was not passed in the manner prescribed by the State Constitution. The decisions are numerous, and the results reached fail of uniformity. *The courts of the United States necessarily adopt the adjudication of the State courts on the subject.*"

At any rate, "the Federal courts will lean toward an agreement of views with the State court if the question seems to them balanced with doubt." (*Folsom v. Ninety-six*, *supra*, p. 625.) How much more so, when the great weight of authority is so largely in favor of the construction of the State court!

III.

The State Supreme Court has never enunciated a doctrine inconsistent with Bank v. Commissioners, 119 N. C., 214.

The clause of the State Constitution (Art. 2, sec. 14) had never been passed upon prior to the above case.

Several authorities in the lower court were relied on to show a former rule different from the present.

Brodnax v. Groom, 64 N. C., 244, was a construction of Article 2, section 12, of the Constitution, which provides: "The General Assembly shall not pass any private law, unless it shall be made to appear thirty days' notice of application to pass such a law shall have been given, under such direction, and in such manner as shall be provided by law."

The *rationale* of the decision is that the Legislature must ascertain before passing a private law that this preliminary notice has been given. Under the organic law, it will not consider such a bill till it is shewn that this provision has been complied with. But its determination is left to the Legislature, and must be conclusive, because no record is required to be made of the notice, and the certificate of the Speakers is conclusive. In the eye of the law no such bill can be passed till notice has been given. The certificate that it has passed involves a certificate that the notice has been given; and this the law will not subject to collateral attack.

Article 2, section 12, relates to preliminaries, the due performance of which the Legislature must ascertain before it acts. But Article 2, section 14, prescribes a method of passage, which the Journals must show. The one looks to a determination by the body that a publication has been made. The other lays down a rule for the passage of taxing acts, and requires the Journal to show affirmatively a compliance with it.

Suppose the notice under section 12 has been given yet the

Legislature determines otherwise, and therefore refuses to pass the act, how can the courts interfere? The determination is for the Legislature. But the Journal shows the method of passage, and the courts can see whether it has been observed.

But in 1878, in *Gallin v. Tarboro*, 78 N. C., 119, the court says that if it appeared by the Journal that the notice was not given it would probably hold the act void.

In *Scarboro v. Robinson*, 81 N. C., 409 (in the year 1879), the only points decided by the court was that the signatures of the presiding officers, affixed during the session of the General Assembly, are essential to the validity of a law, and that the court could not compel the officers, after the expiration of the session, to sign a bill that had really passed.

The decision is a construction of Article 2, section 23, which provides: "All bills and resolutions of a legislative nature shall be read three times in each House, before they pass into laws; and shall be signed by the presiding officers of both Houses."

The court expressly pretermitted any decision upon the right to attack an "act clothed with the prescribed forms of law and placed in the keeping of the proper depository" by evidence derived from the Journals or other extraneous sources. (Pp. 415, 418).

In 1887, *State v. Patterson*, 98 N. C., 660, construed Article 2, section 21, of the Constitution: "The style of the acts shall be: The General Assembly of North Carolina do enact."

This was held to be mandatory. "When the Constitution prescribes and directs in terms, or by necessary implication, that a particular power shall be exercised in a specified way, or a particular thing shall be done by a particular coordinate branch of government—as the Legislature—or by a particular officer or class of officers, and prescribes the way and manner of doing it—such direction can not be disregarded—a due ob-

servance of it is essential, because the Constitution so provides, and its provisions are not in vain or of trifling moment. As we have said, they are organic—made upon solemn consideration by the sovereign authority, and contain general, essential provisions—details are avoided, unless deemed important—essential * * * The answer to these and the like questions must be, that requirements of the Constitution shall prevail and be observed; and when it prescribes that a particular act or thing shall be done in a way and manner specified, such direction must be treated as a command, and an observance of it essential to the effectiveness of the act or thing to be done. Such an act can not be complete—such a thing is not effectual until done in the way and manner so prescribed." *Ib.*, 662, 663.

Such were the decisions up to *Carr v. Coke*, 116 N. C., 223. The bank purchased the bonds long before this case, and brought up its first appeal to the same term. 116 N. C., 339. So it can not claim to be injured by any change of judicial construction as enunciated in that case. Indeed I am at a loss to see how anyone can find, in the light of the decisions I have quoted, any change by the court on this subject.

Nor is there aught in *Carr v. Coke* that conflicts with *Bank v. Oxford*. As was well said by Clark, J., in the latter case (119 N. C., 222): "This case has no analogy to *Carr v. Coke*, 116 N. C., 223. That merely holds that when an act is certified to by the Speakers as having been ratified, it is conclusive of the fact that it was read three several times in each House and ratified. Constitution, Article 11, section 23. And so it is here; the certificate of the Speakers is conclusive that this act passed three several readings in each House and was ratified. The certificate goes no further. It does not certify that this act was read three several days in each House and that the yeas and nays were entered on the Journals. The Journals were in evidence and showed affirm-

atively the contrary. The people had the power to protect themselves by requiring in the organic law something further, as to acts authorizing the creation of bonded indebtedness by the State and its counties, cities and towns, than the fact certified to by the Speakers of three readings in each House, and ratification. This organic provision plainly requires, for the validity of this class of legislation, *in addition* to the certificates of the Speakers, which is sufficient for ordinary legislation, the entry of the yeas and nays on the Journals on the second and third readings in each House."

The distinction is well shown by the railroad charter involved. The certificate of the Speakers is conclusive that the railroad charter passed, and its passage as a charter only is unassailable. But when the Bank attempts to educe from it a power to tax the people of Oxford, it is met by the fact that the charter is not good as a taxing act because the additional and necessary solemnities were not observed, and the act is not good for such purpose.

R. O. BURTON,

Attorney for Commissioners of Oxford.

Raleigh, N. C., September 21, 1900.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

1944

No. 167.

Br. of Shepherd for Stanly Co.

Office Supreme Court U.S.
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Filed Sept. 29, 1900.

No. 167

UNITED STATES SUPREME COURT.

COMMISSIONERS OF WILKES COUNTY, *et al.*,

against

W. N. COLER & CO.

BRIEF OF

JAMES E. SHEPHERD,

FOR COMMISSIONERS OF STANLY COUNTY.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY *et al.*,
APPELLANTS,
against
W. N. COLER AND COMPANY, APPELLEES.

Brief of Argument of James E. Shepherd on Behalf of the Board of Commissioners of Stanly County, Submitted by Leave of the Court.

BRIEF SUMMARY OF CASE.

The above-entitled suit was brought by the complainants, Coler & Co. *v* The Commissioners of Wilkes County, for the recovery of the amount of certain bonds issued by said county, and a decree below was entered in favor of the complainants. The defendant Board (now the plaintiffs in error) appealed to the United States Circuit Court of Appeals for the fourth circuit, and the appeal is now pending in that Court.

The said Coler & Co. also brought a suit against the Board of Commissioners of Stanly County to recover the amount of certain bonds issued by that county. The suit was tried before the Hon. Chas. H. Simonton, Circuit Court Judge, who entered a decree against the said county, which upon appeal to the Circuit Court of Appeals, was reversed and the bonds declared void.

A petition filed by the complainants to rehear is now pending in that Court, the hearing of which has been continued to await the decision of this Court upon the questions certified.

The Union Bank of Richmond also brought a suit against the Commissioners of the town of Oxford for the recovery of the amount due on certain bonds issued by that municipality. This suit was tried before Hon. Thos. R. Purnell, District Judge, who entered a decree in favor of the plaintiffs, and this decree was reversed by the said Court of Appeals.

96 Fed. Rep., 293.

A petition to rehear was filed by the plaintiffs, and the hearing of this petition has also been continued to await the decision of this Court upon the questions certified as aforesaid.

In all of these cases the chief question common to all was whether the particular Acts of the General Assembly allowing the said several municipalities to submit the question of the issue of the bonds to the people were valid. The Supreme Court of North Carolina and the United States Circuit Court of Appeals have decided that these Acts were invalid because they were not passed in conformity with section 14, Article 2, of the Constitution of North Carolina, and other provisions referred to in the certificate.

Peculiar to each of the cases were questions of construction of the various Acts, all of which were decided adversely to the validity of the bonds by the State Supreme Court and Federal Court of Appeals.

Brief of Argument.

It was found as a fact, and indeed conceded in all of these cases, that the special Acts of the Legislature under which the bonds were issued were not passed according to the requirements of Article 2, section 14, of the State Constitution. The decision of the Supreme Court of North Carolina upon

the effect of this failure to observe these requirements is to be found, as to the bonds of the county of Stanly, in the case of *Snuggs* v. *Board of Commissioners*, 121 N. C., 394. It is there held that the said special acts were void, even in the hands of *bona fide* purchasers, as it is always incumbent upon the purchaser to examine whether the power to issue has been duly granted. The opinion of the Court is fully sustained by authority, and cites the case of *Bank* v. *Commissioners of Oxford* (119 N. C., 214), decided in 1896, which was the *first decision upon the said constitutional provision ever made by the State Supreme Court.* The opinion in this case cites all the leading authorities, and it is deemed unnecessary to repeat them here. This decision has been uniformly followed ever since (see cases cited in the certificate), and it clearly shows that the State Supreme Court had never before passed upon the question nor decided anything inconsistent with the conclusion reached. All the previous cases cited upon this point were carefully reviewed and most clearly distinguished. See also brief of R. B. Burton filed herein.

In the Stanly County case, *supra*, and in *Board of Commissioners* v. *Call* (123 N. C., 308), it was urged that authority to issue the bonds was also to be found in sections 1996-2000, general provisions of The Code, but after an elaborate discussion it was held by the Court that those sections applied only to roads whose construction had begun, but which were unfinished at the time of the adoption of the State Constitution of 1868. The Court further held that the language of section 1996, "any railroad in which the citizens of the county may have an interest," means a *pecuniary interest*, and not a mere general interest as contended for by counsel. It is obvious that either of these two constructions of The Code (sections 1996-2000) would have been fatal to the authority claimed. It is not contended by any one that the Supreme Court had ever before been called upon to construe the said sections nor indeed can it be shown that the slightest reference to them has ever been made.

The first question in the certificate is whether the Circuit Court of the United States is bound to follow the decisions of the State Supreme Court upon the points above mentioned. As we have just said, there is and has been no contention that the State Supreme Court has ever passed upon the above sections of The Code, nor do we understand that it is insisted that it really ever had under their consideration Article 2, section 14, of the Constitution, before the bonds in question were issued.

About all the cases upon this point relied upon by the plaintiffs in error are *Carr* v. *Coke*, 116 N. C., 223; *State* v. *Robinson*, 81 N. C., 409; *State* v. *Patterson*, 98 N. C., 660; and *Brodnax* v. *Groom*, 64 N. C., 244. A glance at these will show that they have no bearing upon the point under consideration. They have no relation to the said constitutional provision in reference to the pledging of the faith or credit of the State or county, and only relate to questions concerning the sanctity and validity of an enrolled bill when *passed* under the ordinary provisions of the Constitution.

The cases of Snugg, Call, and Town of Oxford, *supra*, review and distinguish the above decisions from those in which a mandatory requirement of the fundamental law has not been complied with, and which requirement is a condition precedent to the validity of the legislation. The Court, however, upon this point is respectfully referred to the elaborate discussion by Goff, Judge, in delivering the opinion of the Circuit Court of Appeals in this case (*Board of Commissioners of Stanly County* v. *Coler*), to be found in 96 Fed. Rep., 284. This opinion takes up one by one the cases above referred to and clearly shows that they have no bearing on this discussion, and could not have warranted a purchaser in assuming that the Court had ever decided that the said constitutional provision did not mean precisely what it so plainly and unequivocally says. The Court observes:

"The contention of the appellees that there were prior adjudications of the Supreme Court of North Carolina, inconsistent with the decisions of that Court in the cases of *Union Bank of Richmond* vs. *Commissioners of Town of Oxford*, and *Board* vs. *Snuggs*, *supra*, which had become rules of property, and which were overruled by those decisions, is not sustained by an analytical examination of the cases referred to, and in our opinion that Court has not, in any of the cases called to our attention, enunciated a doctrine really in conflict with its decisions in the two cases we have last mentioned."

After referring to the decisions of the State Supreme Court declaring the special acts invalid, and that Code, sections 1996-2000, did not embrace railroads not begun before the Constitution of 1868, and then only those in which the citizens had a *pecuniary* interest, the opinion proceeds:

"With these decisions of the Supreme Court of North Carolina we are in full accord. If we had reached a different conclusion, nevertheless would not the determination of the Court of last resort in North Carolina, upon the questions involved herein, relating, as they do, to the Constitution of that State, and to the validity of certain acts of its General Assembly and their construction, be respected by this Court? Indeed, are we not bound by them? The Supreme Court of the United States in *Leeper* v. *Texas*, 139 U. S., 462, 467, 11 Sup. Ct., 577, 579, said:

"'It must be regarded as settled that whether the statutes of a Legislature have been fully enacted in accordance with the requirements of the Constitution of such State is not a Federal question, and the decision of State courts as to what are the laws of the State is binding upon the courts of the United States *Town of South Ottawa* v. *Perkins*, 94 U. S., 260, 268; *Post* v. *Supervisors*, 105 U. S., 667; *Norton* v. *Shelby Co.*, 118 U. S., 425, 440, 6 Sup. Ct., 1121; *Railroad Co.* v. *Georgia*, 98 U. S., 359, 366; *Balfwin* v. *Kansas*, 129 U. S., 52, 8 Sup. Ct., 193.'

"In *Post* v. *Supervisors*, 105 U. S., 667, Mr. Justice Gray said:

"'* * * * *Third.* The construction uniformly given to the Constitution of a State by its highest court is binding on the courts of the United States as a rule of decision. *Fourth.* An act of the Legislature of a State which has been held by its highest court not to be a statute of the State, because never passed as its Constitution requires, can not be held by the Courts of the United States upon the same evidence to be a law of the State. *Fifth.* That which is not a law can give no validity to bonds purporting to be issued under it, even in the hands of those who can take them for value and in the belief that they have been lawfully issued. It was accordingly held that the Act of the General Assembly of Illinois of February 18, 1857, under which the bonds in suit were issued, having been adjudged by the Supreme Court of that State, in 1870, in the case of *Ryan* v. *Lynch*, 68 Ill., 160, and

Miller v. *Goodwin*, 70 Ill., 659 upon proof that the Journals did not show it to have been enacted in conformity with the requirements of the Constitution, to have never become a law, and to have never conferred any power, although referred to in later statutes as an existing law, those decisions must govern the action of the courts of the United States. The weight of those decisions as authoritative exposition of the Constitution of the State is not affected by the fact that these plaintiffs were not parties to the suits in which they were delivered. *Elmwood* v. *Marcy*, 92 U. S., 289; *East Oakland Tp.* v. *Skinner*, 94 U. S., 225.'"

In illustration of how far the Federal Courts follow the adjudication of the State Courts in the construction of a law, the Court is respectfully referred to the case of *Southern Ry. Co.* v. *North Carolina Corporation Commission*, 99 Fed. Rep., 162. This is perhaps the most important case ever instituted in North Carolina, and involved the validity of the assessment for taxation of all the railroad property therein. The Circuit Judge first held that under the various Acts of the Legislature the former Commission, called the North Carolina Railroad Commission, (the body that made the assessment), had been repealed, but while the case was still under the control of the Court, the Supreme Court of North Carolina, in a controversy between persons claiming to be commissioners (*Abbott* v. *Beddingfield*, 125 N. C., 256), decided to the contrary, and upon a rehearing the Federal Circuit Judge reversed his former ruling and followed that of the State Court. The opinion of the Circuit Judge is in 99 Fed. Rep., 162, and is replete with authority sustaining his action. See also *Hartford Fire Ins. Co.* v. *Chicago, Milwaukee & St. Paul Ry. Co.* (Nov., 1899, 20 Sup. Ct., 33), the latest decision of this Court upon the subject, from which we take the following extract:

"The first opinion of the Supreme Court of Iowa in the case of *Griswold* v. *Illinois C. R. Co.* was delivered after the agreement now in question was made. The final decision in that case, reversing the former opinion, was made after repeated arguments and full consideration; was nowise inconsistent, to say the least, with the decision or the opinion of that court in any other case, and was rendered before the case at bar was decided in the Circuit Court of the United States. Under such circumstances, that decision, being upon a question of statutory and local law, was rightly followed by

the Circuit Court. *Rowan* v. *Runnels*, 2 How., 134, 139; *Morgan* v. *Curtenius*, 20 How., 1; *Fairfield* v. *Gallatin Co.*, 100 U. S., 47; *Burgess* v. *Seligman*, 107 U. S., 20; *Bauserman* v. *Blunt*, 147 U. S., 647, 653, 656; *Williams* v. *Eggleston*, 170 U. S., 304, 311; *Sioux City Terminal R. and Warehouse Co.* v. *Trust Co. of N. A.*, 173 U. S., 99; *Wade* v. *Travis Co.*, 174 U. S., 499."

It is respectfully submitted that if the ruling of the State Court is adopted, the other questions are easily answered, inasmuch as every purchaser is affected by a want of power, and it is incumbent upon him to examine into the law under which the power is sought to be exercised, both as to the validity as well as the construction of such law. In the Stanly County case the bonds on their face *recite* that they were issued under a special Act ratified in March, 1887, and of sections 1996, 1997, 1998. The Supreme Court of North Carolina has decided that the said sections, construed with reference to the other parts of the Constitution and laws of the State, apply only to railroads unfinished at the adoption of the Constitution in 1868. The want of power being thus manifest by the inspection of the Journals, as well as by a proper construction of The Code provisions, it is too well settled to require the citation of much authority that even *bona fide* purchasers are affected by the infirmity.

Brenham v. German-Amer. Bank, 144 U. S., 173-610.
Barnett v. Dennison, 145 U. S., 135.
South Ottawa v. Perkins, 94 U. S., 260.
Merchants Bank v. Bergen Co., 115 U. S., 384.
Norton v. Brownsville.
Lake Co. v. U. S., 674.

If the Court felt at liberty to review the construction placed upon the provisions of the Code, sections above referred to, we respectfully submit that such construction is abundantly vindicated by the reasoning and authorities cited in *Snuggs* v. *Commissioners*, *supra*, and *Board of Commissioners* v. *Call*. The Circuit Court of Appeals, as we have before re-

marked, after referring to these cases in reference to the said sections, said: "With these decisions of the Supreme Court of North Carolina *we are in full accord.*"

In view of these cousiderations, we submit that the answer to these questions should be that the construction of the State Supreme Court should be followed and, therefore, the bonds in question are void, into whomsoever hands they may have come.

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